INTERIOR BOARD OF LAND APPEALS

Ronald W. Byrd

171 IBLA 202 (April 11, 2007)

RONALD W. BYRD

IBLA 2005-17 Decided April 11, 2007

Appeal from a decision of the Field Manager, Grants Pass Resource Area, Bureau of Land Management, ordering appellant to cease and desist excavating and removing mineral materials from his unpatented mining claims without a permit and directing him to pay trespass damages. OROR 5826601.

Affirmed in part; set aside and remanded in part.

1. Materials Act--Mining Claims: Common Varieties of Minerals

   Extraction and removal of common varieties of rock from mining claims located after passage of section 3 of the Multiple Use Mining Act of 1955, 30 U.S.C. § 611 (2000), must be authorized by BLM under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (2000), and its implementing regulations in 43 CFR Part 3600.

2. Mining Claims: Placer Claims

   The question whether tailings are personalty or realty depends on the intent of the owner of the claim at the time of creation of the tailings. Absent evidence from a claimant supporting the assertion that tailings on a placer mining claim, which were created by historic hydraulic placer gold mining, are personalty, those tailings will be determined to be realty.

3. Materials Act--Mining Claims: Common Varieties of Mineral

The owner of a mining claim located prior to passage of section 3 of the Multiple Use Mining Act of 1955, 30 U.S.C. § 611 (2000), is not required to seek authorization from BLM under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (2000), and its implementing regulations in 43 CFR Part 3600, prior to extraction and removal of rock from the claim, if the rock in question was, at the time of passage of the Multiple Use Mining Act of 1955, a valuable mining law mineral.

4. Mining Claims: Common Varieties of Mineral--Mining Claims: Surface Management: Mining Notice

Operations to extract and remove rock that constitutes a valuable mining law mineral from a mining claim located prior to passage of section 3 of the Multiple Use Mining Act of 1955, 30 U.S.C. § 611 (2000), must comply with the requirements of 43 CFR Subpart 3809.

APPEARANCES: James R. Dole, Esq., Grants Pass, Oregon, for appellant; Mariel J. Combs, Esq., Office of the Regional Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Ronald W. Byrd has appealed from an August 4, 2004, decision of the Field Manager, Grants Pass Resource Area, Bureau of Land Management (BLM), ordering him to cease and desist the excavation and removal of mineral material from his unpatented placer mining claims located in secs. 2 and 3, T. 35 S., R. 8 W., Willamette Meridian, Josephine County, Oregon. The Field Manager specifically referenced only three claims: the Harmon and Bailey #2 (ORMC 28568), the Duff (ORMC 39035), and the Dan L. Green (ORMC 45333). [1/] BLM also directed the

[1/] The decision in question does not identify the claims by recordation number. We have added the recordation numbers based on the names provided in the decision. The case record indicates, however, that BLM may have intended to name the Dan L. Green #2 mining claim (ORMC 68223), rather than, or in addition to, the Dan L. Green mining claim. See Administrative Record (AR), ORORO 5826601, at Tab 28; Answer at 1, Ex. 4. In addition, the Harmon and Bailey #2 claim is sometimes referred to in the record as the Harmon & Bailey #2. We refer to the claim as the (continued...)

payment of $4,354.25 in willful trespass damages for removal of 230 cubic yards of rock without a permit. [2/]

For the reasons set forth below, we affirm BLM's decision in part and reverse it in part.

I. Background

Appellant owns a number of unpatented placer mining claims in the Galice Creek Mining District near Grants Pass, Oregon. Several of those claims, including the three identified by BLM in its decision, are located in secs. 2 and/or 3, T. 35 S., R. 8 W. Areas of the surface of appellant's claims are covered by substantial amounts of tailings from historic placer gold mining activities. [3/]

In January 2003, BLM discovered that "mineral material in the form of boulders and cobbles" had been removed from the Dan L. Green #2 claim (ORMC 68223), which BLM described as being located in the S½NE¼SE¼ sec. 3, T. 35 S., R. 8 W. [4/] (BLM Answer, Ex. 5.) BLM considered that material to be non-locatable under the mining law and its removal a trespass. BLM notified Byrd to cease removal and initiated a mineral material trespass action (OROR 58266). Id. BLM and Byrd resolved that matter through an agreement to enter into a mineral material sale contract (8521193) to cover the past removal and allow an additional

---

[1/] (...continued)
Harmon and Bailey #2, as BLM did in its decision.

[2/] As discussed infra, the trespass damages apparently relate only to the extraction and removal of rock from the Harmon and Bailey #2 claim.

[3/] Tailings are, inter alia, "[t]he sand, gravel, and cobbles which pass through the sluices in hydraulic mining," although such material more recently, "especially in state and United States legislative documents" has been described as "mining debris or simply debris." United States Department of the Interior (Bureau of Mines), A Dictionary of Mining, Mineral, and Related Terms at 1116-17 (1968). The rock in question was being sold to purchasers supplying stone for landscaping and building needs. (AR, OROR 5826601, at Tab 2.)

[4/] It is not possible to determine from photographic evidence in the record whether all the material in question on the claims involved in this case is tailings from previous placer gold mining activity.

amount of material to be removed from the Dan L. Green #2 claim. [5/] Id. at Ex. 6. BLM and Byrd entered into two more mineral material sale contracts for removal of rock, the last (85251197) expiring on June 1, 2004. [6/]

On the date of expiration of the latter contract, BLM received a letter from Byrd requesting "another rock contract, under the same terms." BLM refused to enter into another contract, stating that it needed to have "an interdisciplinary team" determine whether to do so. (BLM letter to Byrd's counsel, dated June 4, 2004.)

Thereafter, BLM found that mineral material was being extracted and removed from the Harmon and Bailey #2 mining claim and stored and/or processed on the Duff and Dan L. Green claims, and it notified Byrd and his counsel, by letter dated June 22, 2004, that Byrd could "remove the rock that has already been moved to the processing area," but that any further removal would "require a BLM permit issued according to the BLM's mineral material disposal regulations set forth at [43] CFR Subpart 3600." (Answer, Ex. 9 at 1; see Answer, Ex. 8.) BLM stated that to initiate the process Byrd would have to file a proposal, including a mining and reclamation plan.

BLM continued to inspect activities being conducted in secs. 2 and 3, T. 35 S., R. 8 W. (Answer, Exs. 12-15), and, on August 4, 2004, BLM issued the decision subject to the present appeal. [7/] While BLM stated in the decision that it was ordering Byrd to cease and desist the excavation and removal of all mineral materials from his claims in secs. 2 and 3, its determination of the amount of rock that had

---

[5/] That contract, entered into on Mar. 24, 2003, expired on June 24, 2003. The contract described the contract area as "T 35 S R 8 W Sec 3 S½NESE." (AR OROR 58266, Tab 6.)

[6/] While the second contract covered the same area as the first, the last contract did not include a section number in its description of the contract area, referring only to "T 35 S R 8 W Sec SE¼." (AR, OROR 58266, Tab 6.) There is, however, no indication that the parties intended the contract area to expand beyond the SE¼ of section 3.

[7/] BLM had previously issued a decision on July 9, 2004, ordering Byrd to cease and desist mineral material removal activities in sec. 3, T. 35 S., R. 8 W. BLM received a notice of appeal of that decision from Byrd on the same day it issued the Aug. 4, 2004, decision, which rescinded the July 9, 2004, decision because it "inadvertently misidentified the Section where the unauthorized excavation and removal of mineral material was occurring." (Decision at 1.) On Aug. 12, 2004, Byrd withdrew that appeal.

recently been excavated and removed without a permit, and for which it was assessing trespass damages, apparently was limited to the Harmon and Bailey #2 claim. [8/] (Answer, Exs. 23 and 24.) Appellant characterizes the August 4, 2004, decision as constituting a "notice of trespass alleging misappropriation of rock only from the Harmon and Bailey #2 claim." (SOR at 3.) He adds that "[t]his notice of trespass is the subject of this appeal." [9/] Id.

II. Issues

The issues presented on appeal are whether BLM properly required Byrd to cease and desist rock extraction and removal operations on the specific claims listed by BLM in its decision and whether BLM properly issued the notice of trespass demanding payment of trespass damages.

III. The Mining Law and the Materials Act

[1] Under the General Mining Law of May 10, 1872, as amended, 30 U.S.C. §§ 22 et seq. (2000), all valuable mineral deposits were opened to location by citizens of the United States, who could, subject to certain conditions, purchase those minerals and the lands in which they were found. [10/] While valuable deposits of such

---

[8/] According to the copies of the maps filed with the copies of the location notices for recordation with BLM, the Harmon and Bailey #2 claim is located in sec. 2, the Duff in sec. 3, and the Dan L. Green and Dan L. Green #2 claims straddle the section line between those sections. However, other evidence in the record indicates that the Dan L. Green and Dan L. Green #2 claims are located entirely within sec. 3. (Statement of Reasons (SOR), Ex. A and Ex. G at 1.)

[9/] In its answer, BLM states that "BLM calculated the volume of mineral material removed by counting new pallets of material and observing areas of disturbance on the Harmon and Bailey #2 claim," citing BLM Exs. 12, 15, and 25, relating to inspections of the Harmon and Bailey #2 claim on July 7, July 26, and Aug. 2, 2004. (Answer at 6.) In an affidavit accompanying his SOR, Byrd states that he had an agreement with a third party for removal of rock "from claims including the Harmon & Bailey #2, the Duff, and the Dan Green #2." (Byrd Affidavit, dated Sept. 22, 2004, at 2.) In Byrd's opinion, the rock coming from those three claims is indistinguishable, and he "did not bother to account for what rock came from which claims." Id. He stated, therefore, that "it is impossible to conclude that 230 [cubic] yards of rock came from the Harmon & Bailey #2 claim." Id.

[10/] In 1892, Congress passed the Building Stone Act in order to clear up confusion

(continued...)

minerals as gold and silver were clearly "locatable" under the mining law, not all material that could be removed from the earth and sold at a profit was considered by the Department to be locatable under the General Mining Law. United States v. Bienick, 14 IBLA 290, 297 (1974) (Judge Stuebing concurring). Thus, in 1947 Congress passed the Materials Act, as amended, 30 U.S.C. §§ 601-604 (2000), authorizing the disposition of, inter alia, sand, stone, and gravel "'not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.'" United States v. Mattey, 67 I.D. 63, 65-66 (1960), quoting comments of the Under Secretary of the Interior found in S. Rept. No. 204, 80th Cong., 1st Sess. (1947).

Eight years later, Congress passed the Multiple Use Mining Act of 1955, also known as the Surface Resources Act or Common Varieties Act, section 3 of which, as amended, 30 U.S.C. § 611 (2000), declared that no deposit of common varieties of, inter alia, sand, stone, or gravel would be considered "a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws." Thus, Congress removed common varieties of those materials from the purview of the mining law and made them subject to the provisions of the Materials Act. United States v. Pitkin Iron Corp., 170 IBLA 352, 354 (2006); United States v. Multiple Use, Inc., 120 IBLA 63, 76A (1991). Congress made clear, however, that the term "common varieties" did "not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *." 30 U.S.C. § 611 (2000); United States v. Thompson, 168 IBLA 68, 75 (2006).

Two years after the enactment of the Multiple Use Mining Act, the Solicitor addressed an inquiry whether it was permissible for holders of unpatented gold placer mining claims to sell sand and gravel from the claims as a by-product of gold mining operations. He answered "in the affirmative" with respect to valid claims located prior to the July 23, 1955, passage of the Act, "assuming that the sand and gravel is a valuable mineral," but for claims located thereafter, he stated that the claimant could "use the sand and gravel for any mining purpose, but he has no

---

[10/] (...continued)
that had been generated by decisions of this Department regarding the proper method of entry for valuable deposits of building stone. United States v. Haskins, 59 IBLA 1, 42-43, 88 I.D. 925, 945-46 (1981). Therein, Congress allowed entry of lands chiefly valuable for building stone under the placer mining laws. 30 U.S.C. § 161 (2000).

authority to appropriate and sell it." Solicitor's Opinion, "Disposal of Sand and Gravel from Unpatented Mining Claims," M-36476 (Aug. 28, 1957) at 2, 4. See 1 American Law of Mining, § 21.03[2] (2d. ed. 1996). Thus, the Solicitor distinguished between the rights of claimants to dispose of sand and gravel on their unpatented mining claims based upon the date of the location of their claims. For claims located on or after July 23, 1955, he found the claimants had no right under the mining law to appropriate and sell sand and gravel from their claims. Disposition could only be authorized in accordance with the Materials Act.

Under the Materials Act, as amended, and its implementing regulations, 43 CFR Part 3600, BLM has considerable discretion to dispose of mineral materials from the public lands by sale or other means. Jenott Mining Corp., 134 IBLA 191, 194 (1995). No disposal is authorized by the statute where it would be "detrimental to the public interest." 30 U.S.C. § 601 (2000); 43 CFR 3601.6(a). In addition, the regulations preclude BLM from disposing of mineral materials if it determines "that the aggregate damage to public lands and resources would exceed the public benefits that BLM expects from the proposed disposition." 43 CFR 3601.11.

IV. Discussion Concerning Mineral Material on the Dan L. Green and Duff Claims

While Byrd does not specifically address these mining claims on appeal, his position regarding all his claims is that any mineral material excavated and removed is mine tailings; that mine tailings are personalty; and that, as personalty, they belong to him, not to the United States. The Dan L. Green and Duff claims were located in 1981 and 1980, respectively. Even to the extent that mining tailings from historic gold mining on the lands covered by those claims may have become the personalty of the persons conducting the mining under prior mining claims, the ownership of that personalty reverted to the United States when abandoned by the previous owners. See Brothers v. United States, 594 F.2d 740, 741 (9th Cir. 1979). In addition, the tailings on those claims were not valuable mineral deposits within the meaning of the mining laws at the time of location of the claims in the 1980's because common varieties of stone were removed from location under the mining law in 1955 by the Multiple Use Mining Act. [11/] Byrd makes no allegation that the rock in question on any of his claims is an uncommon variety excepted from the provisions of the Multiple Use Mining Act.

Thus, extraction and removal of stone from those claims could take place, if at all, only pursuant to authorization from BLM under the mineral material disposal

[11/] The result would be no different for the Dan L. Green #2 claim, which was located in 1983.

regulations in 43 CFR Part 3600. To the extent BLM's August 4, 2004, decision ordered Byrd to cease and desist extraction and removal of mineral materials from the Duff and Dan L. Green claims, as an unauthorized use under 43 CFR 3601.72, it is affirmed.

V. Discussion Concerning Mineral Material on the Harmon and Bailey #2 Claim

On October 19, 1979, BLM received a copy of a location notice for the "C. E. Harmon and George Bailey Claims (TWO CLAIMS)." The location notice showed the date of location as November 19, 1896. BLM assigned the claims recordation numbers ORMC 28567 and ORMC 28568. [12/] Thereafter, commencing with the proof of labor filed by claimants on October 14, 1980, the claims were referred to as the Harmon and Bailey #1 (ORMC 28567) and the Harmon and Bailey #2 (ORMC 28568). Byrd and his wife acquired the Harmon and Bailey #2 claim by quitclaim deed on June 15, 1986. [13/] BLM declared the Harmon and Bailey #1 claim abandoned and void on June 3, 1988, for failure to comply with the filing requirements of sec. 314 of the Federal Land Policy and Management Act, 43 U.S.C. § 1744 (2000).

[12/] The claimants stated in an accompanying document that the "Harmon and Bailey claims are in the Northeast Quarter of said Section 2 [T. 35 S., R. 8 W.]." The map accompanying the location notice, however, does not depict the exact location of the two claims. Instead, it outlines an area of 160 acres, 80 acres in section 2 and 80 acres in section 3. The description in the copy of the 1896 location notice identifies the description of the Harmon and Bailey claim as "[c]ommencing at the North East corner of the claim of Dan L[.] Green on the opposite side of Galice Creek from the mouth of Blanchard Gulch * * *." The accompanying map shows the mouth of Blanchard Gulch in the SW¼ of section 2.

[13/] On Feb. 7, 1990, Byrd and his wife filed an amended notice of location with BLM for the Harmon and Bailey #2 claim describing it as being located in the SE¼SW¼NW¼ and the NE¼NW¼SW¼ of section 2. Thus, it is not clear whether the Harmon and Bailey #2 claim was properly amended to reflect the historic location of that claim or whether the 1990 location was a relocation or a new location. For purposes of this decision, however, we will presume that the Byrds' filing in 1990 was a proper amended location of the Harmon and Bailey #2 claim. BLM should investigate this matter on remand because only an amended location relates back to the date of the original location. See Rand Mining Co., 142 IBLA 86, 90 (1997).

While the amount is in dispute, there is no question that mineral material was extracted and removed from the Harmon and Bailey #2 claim during the time period in question. However, BLM's order to cease and desist such extraction and removal on the basis that such activities can only be undertaken on that claim pursuant to the authorization under 43 CFR Part 3600 cannot be upheld at this time because mineral material on the Harmon and Bailey #2 claim is governed by the mining law as it existed prior to the enactment of the Multiple Use Mining Act of 1955.

Again, Byrd argues that the material in question is mine tailings, which were severed from the ground by his predecessors and, as personalty, he has the legal right to sell those materials. Appellant asserts that, according to Federal and Oregon case law, mine tailings become personal property once they are removed from the ground. Appellant's argument is that the tailings became the claim owner's personal property upon removal from the ground and that he and his wife are now the owners of the claim and that personal property.

BLM argues that such a possessory interest in the tailings did not pass to appellant. BLM admits that tailings become personalty when severed from the ground, citing United States, George B. Conway, Intervener v. Grosso, 53 I.D. 115, 125 (1930). However, BLM argues in this case that possession of the tailings reverted back to the Federal government "when abandoned by the previous claimants," citing Brothers v. United States, supra, and United States v. Burnett, 750 F.Supp. 1029, 1032 (D. Idaho 1990). (Answer at 4.)

BLM's argument, however, concedes the controlling issue. To the extent the rock removed from the Harmon and Bailey #2 claim can be considered mine tailings, it is not personalty, and it is not subject to disposal as such by Byrd. [14/]

[2] The question of whether tailings are personalty or realty depends on the intent of the owner of the claim at the time of creation of the tailings. See 6 American Law of Mining, § 205.07[3] (2d ed. 1985).

In Grosso, the Assistant Secretary affirmed the rejection of a patent application for a placer mining claim because the claim was located on land, which in its "natural

---

[14/] The cases cited by BLM to support abandonment of the tailings relate to situations involving the relocation of a mining claim or claims on lands containing existing structures and/or personalty that had been the site of a previous claim or claims declared void in an agency adjudication. Those case would only be applicable, if at all, were BLM to establish that the Byrds' 1990 location is not, in fact, an amended location of the Harmon and Bailey #2 claim. See n.13, supra.

condition" was nonmineral in character, that land being the site of a mill site location by the claimants on which extensive tailings from previous mining and milling operations had been deposited. 53 I.D. at 126. The tailings in that case contained considerable mineralization and "were confined by cribbing consisting of several thousand logs." Id. at 122. The Assistant Secretary found that the tailings had been "deposited to wait for better days," which had "but recently come." Id. at 125.

In concluding that the tailings in that case were personalty that had not been abandoned by the owner, the Assistant Secretary cited with approval the following language from Steinfield v. Omega Copper Co., 16 Ariz. 230, 141 P. 847, 848 (1914): "The intention with which the owner of the property extracted the ore from the ground and the purpose and intention of the owner with which it was placed on the dump is controlling in arriving at the solution of the question whether the ore after having been extracted and placed in the dump was personalty or realty." The Steinfield court further stated: "No one has ever contended that because the owner of realty removes a portion of earth from one part of the premises to another that such portion removed necessarily becomes personal property by reason of the fact of removal." Id.

Intent to treat tailings as personal property may be evidenced by such actions as building and maintaining barriers to impound tailings or placing tailings in orderly piles. 6 American Law of Mining, § 205.07[3] (2d ed. 1985), and cases cited. Courts have also accepted other evidence to establish personal property ownership, such as hiring individuals to impound or guard the material and keeping records of the quantity of the material. Id.

Thus, the mere fact that Byrd's predecessors-in-interest moved considerable amounts of rock and gravel during their hydraulic placer gold mining activities does not impart to that material the status of personalty. In fact, the opposite conclusion, that the tailings are realty, is justified given the very nature of hydraulic placer gold mining, which involves the random distribution of waste material into the natural water course. [15/] Absent evidence from Byrd to support his assertion that the tailings

---

[15/] Hydraulic mining is "[t]he process by which a bank of gold-bearing earth and rock is excavated by a jet of water, discharged through the converging nozzle of a pipe under great pressure, the earth and debris being carried away by the same water, through sluices, and discharged on lower levels into the natural streams or watercourses below; where the gravel or other material of the bank is cemented, or where the bank is composed of masses of pipe clay, it is shattered by blasting with powder." United States Department of the Interior (Bureau of Mines), A Dictionary

(continued...)

on the Harmon and Bailey #2 claim are personalty, we find that the tailings created on that claim by historic hydraulic placer gold mining are realty. [16/]

[3] The fact that the rock is realty, however, does not foreclose its disposition by Byrd. The Solicitor's Opinion, as discussed above, supports a determination that Byrd, by virtue of the pre-1955 location of his claim, is entitled to mine and remove all valuable mining law minerals from his claim, as those minerals were defined prior to passage of the Multiple Use Mining Act of 1955. The rock in question, which is sold to purchasers supplying stone for landscaping and building needs, might be such a mineral. Therefore, we must conclude that Byrd may have had the right to excavate, remove, and sell that rock without authorization under 43 CFR Part 3600. In order to establish that he has such a right, he must show, however, that the rock in question was, at the time of passage of the Multiple Use Mining Act of 1955, a valuable mining law mineral. See United States v. Silverton Mining and Milling Co., Inc., 1 IBLA 16, 20 (1970), aff'd sub nom. Multiple Use, Inc. v. Morton, 504 F.2d 448 (9th Cir. 1974). The record before the Board does not contain any evidence supporting such a conclusion. [17/]

VI. Notice of Trespass

Having determined that Byrd might have the right to dispose of the mineral material in question on the Harmon and Bailey #2 claim, we must conclude that BLM

[15/] (...continued)
of Mining, Mineral, and Related Terms at 560 (1968).

[16/] The same holds true for any rock on the claim that is not tailings created by historic hydraulic placer gold mining. It is also realty.

[17/] BLM's initial determination of Byrd's right to use vegetative and other surface resources on the claim, under sec. 5 of the Multiple Use Mining Act of 1955, 30 U.S.C. § 613 (2000), as acknowledged most recently in its decision dated Jan. 21, 2000, does not provide an independent basis for Byrd's sale of the rock in question. Absent the necessary evidence to show that the rock was, at the time of passage of the Multiple Use Mining Act of 1955, a valuable mining law mineral, the rock must be considered nonlocatable and, thus, not available for exploitation for any use, except as necessary for mining purposes on the claim itself. See Solicitor's Opinion, supra, at 2-3 (For a claim located prior to July 23, 1955, the claimant is entitled "to mine and remove all valuable mining law minerals as those minerals were defined prior to July 23, 1955," but, if the sand and gravel or other material on the claim "is not a valuable mineral," the claimant "has no authority to dispose of it prior to patent.").

improperly issued its notice charging Byrd with trespass for removal of 230 cubic yards of stone from the Harmon and Bailey #2 claim. [18/] Any determination of trespass for such removal is premature. For that reason, we set aside that part of the decision providing Byrd with the notice of trespass and requiring the payment of trespass damages. [19/]

VII. Authority to Extract and Remove Mineral Material from the Harmon and Bailey #2 Claim

That does not end the matter, however, because we must still determine whether BLM's direction to cease and desist operations on the Harmon and Bailey #2 claim has some support in law other than the regulations in 43 CFR Part 3600, which may not apply.

[4] BLM asserts that, even assuming that excavation of mineral material were associated with legitimate mining activity, "such excavation is not described in the 1987 Notice of Intent to Mine that Mr. Byrd filed for the Harmon and Bailey Number 2 claim," citing Ex. 20 to its answer, which is a copy of that notice, dated July 28, 1987. (Answer at 5.) First, BLM alleges that it informed Byrd on August 11, 2002, that all mining notices on file with BLM on January 20, 2001, would expire on January 20, 2003, in accordance with 43 CFR 3809.300(a), unless extended, and that it "has no record of Mr. Byrd filing for an extension of his notice." Id. at 5 n.1. Second, BLM asserts that the description of activities in the 1987 mining notice "does not include any reference to removal of mine tailings." Id.

The case record shows that on May 1, 1987, Byrd filed a mining notice with BLM for his Bailey and Anderson mining claim (ORMC 32783) located in sec. 2, T. 35 S., R. 8 W. BLM assigned that notice serial number OR-MN-110-44-87. Thereafter, on July 29, 1987, BLM received another mining notice for the Bailey and Anderson and separate notices for the Harmon and Bailey #2, the Dan L. Green and the Dan L. Green #2, all four notices dated July 28, 1987. BLM assigned all those notices the MN-OR-110-44-87 serial number.

The July 1987 notice for the Harmon and Bailey #2 claim notes the existence of "[e]xtensive old hydraulic workings on both sides of the creek" and a "blacktop

---

[18/] To the extent BLM has evidence supporting removal of material from Byrd's post-1955 claims without authorization under 43 CFR Part 3600, it may pursue a trespass action therefor.

[19/] In its answer, BLM recalculated the trespass damages as $3,663.50. However, Byrd is not responsible for any amount at this time.

road running lengthwise through the claim," and describes the mining operation: "Holding pond for plant on the Dan L. Green #2 will be in a previously disturbed area at the SW end of the claim. Sampling and some material to pilot plant. Dredging in creek."

Although BLM states that it has no record of Byrd filing for an extension, the case record contains a timely extension request in a letter from Byrd to the Medford, Oregon, District Office, dated January 9, 2003, and received by BLM by certified mail on January 13, 2003. See SOR, Ex. C at 1-2. Therein, Byrd stated: "I plan to continue to operate under my notice of intent filed in 1987 as amended." [20/] (SOR, Ex. C at 1.) He also raised several questions about bonding and reclamation and requested a list of "approved companies, which are providing acceptable forms of financial guarantee." Id. In addition, Byrd points to Exhibit 25 of BLM's answer, which is a copy of a July 26, 2004, e-mail authored by Diane Parry (elsewhere identified in the case record as the Medford District Office's Western Zone Lead Geologist) relating to her inspection of the Harmon and Bailey #2 claim on the same date. Therein, Parry states that "[t]he mining claim records show that there has been a notice of intent for all the claims in question. They have not been closed."

In order to extend a mining notice, a claimant must notify BLM in writing before the expiration date of the notice and meet the financial guarantee requirements of 43 CFR 3809.503. See 43 CFR 3809.333. In the present case, Byrd timely notified BLM in writing in January 2003 that he intended to continue operating under MN-OR-110-44-87, and he requested financial guarantee information. The case record does not contain any response from BLM prior to issuance of the decision in question. [21/] While there is no evidence that Byrd

---

[20/] Byrd offers a copy of a Mar. 16, 1993, letter to BLM stating that he wished to amend his "notice of intent to conduct mining operations MN-OR-110-44-87." Byrd stated that he wanted to remove the Bailey and Anderson claim from the notice and add four other claims, one of which was the Duff mining claim. In his letter, Byrd stated: "There is much old hydraulic workings on each of the added claims." He added that the operation would "mostly consist of testing of the claims along with some production as warranted," and that there would be some dredging activity.

[21/] The record shows that Byrd sought an additional extension of MN-OR-110-44-87 on Jan. 5, 2005, iterating his questions about bonding and reclamation. BLM responded on Jan. 20, 2005, stating that his description of proposed activities required a modification of his notice under 43 CFR 3809.331(a)(2). It stated that a list of approved forms of financial guarantee would be forthcoming "in a later correspondence." BLM added that, to the extent Byrd intended his modification to

(continued...)

complied with the financial guarantee requirements prior to continuing operations on the Harmon and Bailey #2 claim, there is evidence that BLM considered his mining notice not to have expired and that it remained subject to modification. (BLM Letter to Byrd, dated Jan. 20, 2005, relating to mining notice MN-OR-110-44-87 ("You may not begin operations until you modify your notice, 43 CFR 3809.313(b)").) Nevertheless, the regulations expressly prohibit "[b]eginning operations prior to providing a financial guarantee that meets the requirements of this subpart." 43 CFR 3809.605(d).

Therefore, while Byrd had an outstanding mining notice that covered the Harmon and Bailey #2 claim at the time BLM issued its August 4, 2004, decision, he was prohibited from operating thereunder after January 20, 2003, without providing a financial guarantee meeting the regulatory requirements. See Robert B. Wineland, 169 IBLA 212, 219-20 (2006).

Moreover, there is no evidence that the notice covered the extraction and removal of the material in question. Byrd asserts that his amended notice, dated March 16, 1993, quoted supra, "discloses the fact that old mine tailings exist on the claim and that mining is contemplated. It is a reasonable inference that one way to move the tailings to access valuable ore would be to exploit a market to sell what would otherwise be waste. Sale of the tailings is incident to mining." (Reply at 3.)

Nothing in that amended mining notice, however, can fairly be read as providing BLM with notice that Byrd would be conducting mining operations to extract and remove the rock in question from the Harmon and Bailey #2 claim and selling it as part of his "testing of the claims along with some production" or his dredging operations. See n.17, supra. The activities in question on the Harmon and Bailey #2 claim, assuming the rock in question was, at the time of passage of the Multiple Use Mining Act of 1955, a valuable mining law mineral, had to be conducted in accordance with the mining claim surface management regulations in 43 CFR Subpart 3809. Those regulations expressly prohibit "[c]onducting any operations outside the scope of your notice or approved plan of operations." 43 CFR 3809.605(c).

The actions BLM may take to address violations of the mining claim surface management regulations are set out at 43 CFR 3809.601(a) (issuance of noncompliance orders), 43 CFR 3809.601(b) (issuance of suspension orders), and

---

21/ (...continued)
include removal of decorative rock, such removal could only take place pursuant to 43 CFR Part 3600.

43 CFR 3809.602 (revocation of plans of operations or nullification of mining notices). There is no provision in those regulations for the issuance of an order to "cease and desist," such as the one at issue. Moreover, there is no indication in the record that BLM sought to invoke the regulations in 43 CFR Subpart 3809 in issuance of that order.

To the extent BLM's decision ordered Byrd to cease and desist extraction and removal of mineral material on the Harmon and Bailey #2 claim, it is set aside. Setting aside that order, however, does not, as explained above, authorize Byrd to excavate, remove, and sell rock from the Harmon and Bailey #2 claim under either the Mining Law or the Mineral Materials Sales Act. If he can establish that any of the rock in question was, at the time of passage of the Multiple Use Mining Act of 1955, a valuable mining law mineral, he may mine and sell that rock only after compliance with 43 CFR Subpart 3809. [22/]

VIII. Summary

BLM's decision in this case is affirmed to the extent it ordered Byrd to cease and desist removal of mineral material from the Dan L. Green and Duff mining claims because that material on those claims, located after July 23, 1955, may only be disposed of pursuant to the Materials Act, as amended, and its implementing regulations in 43 CFR Part 3600.

Byrd may have the right to dispose of the material in question from the Harmon and Bailey #2 claim. Therefore, the part of the decision providing Byrd with notice of trespass and demanding payment of trespass damages is set aside. However, if Byrd can establish a right to mine the material, as discussed herein, he is subject to compliance with the regulations in 43 CFR Subpart 3809 governing surface management of mining claims for that activity. His existing mining notice, as amended, did not cover the activities in question. Even assuming Byrd had a right to mine the material and the activity was covered by the existing mining notice, as amended, he engaged in those activities without submitting the financial guarantee required by regulation.

The proper enforcement procedures for violations of 43 CFR Subpart 3809 are found in that subpart. They do not include the issuance of an order to "cease and

[22/] He must, of course, comply with 43 CFR Subpart 3809 for his gold mining activities on the claim, in any event.

desist." The order to cease and desist excavation and removal of mineral material from the Harmon and Bailey #2 claim is set aside. [23/]

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside in part and the case remanded.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge

[22/] We note that, while Byrd seeks reimbursement of attorney's fees under the Equal Access to Justice Act (EAJA), we have stated that "appeals adjudicated by this Board cannot give rise to a petition for costs and expenses under the EAJA regardless of the outcome of the appeal to the Board since the consideration of such an appeal would not constitute an adjudication under [5 U.S.C.] section 554 [of the Administrative Procedure Act] as required by the EAJA." Tom Cox, 155 IBLA 273, 275 (2001).